SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

W.W.W. ENTERPRISES, INC.
d/b/a WILLIAMSON OF HOMESTEAD,

Petitioner,

vs.

JESUS PIDAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

Does St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), apply to claims under the Americans with Disabilities Act, and if so is it improper for a finder of fact to conclude that the Appellee, Pidal (Plaintiff below) met his ultimate burden of proving discrimination where Appellee was terminated for drinking on the job in violation of company policy, the Appellant, "Williamson Pontiac, Cadillac and Mazda" (Defendant below) was unaware of other employees drinking on the job, and where Plaintiff was re-hired after medical leave with no obligation under law or company policy to do so, prior to the time that Plaintiff was terminated?

LIST OF PARTIES

Rule 29.6 Statement

There are no parties to this proceeding who are not revealed in the caption of this case.

Petitioner, W.W.W. Enterprises, Inc. is a Florida corporation organized and existing under the Laws of the State of Florida. It is owned cooperatively by its members, and its shares are not publically traded.

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STATEMENT OF JURISDICTION

On October 26, 1996, the Appellate Court for the Eleventh Judicial Circuit entered its mandate affirming in part, and reversing in part the Decree of the District Court for the Southern District of Florida and Remanded the cause to the District Court for recalculation of back pay award. On November 18, 1996, Petitioner timely filed a Motion to Recall Mandate.

On December 13, 1996, the Appellate Court for the Eleventh Judicial Circuit denied the Motion to Recall Mandate.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

Americans With Disabilities Act of 1990

42 U.S.C. §12102 et seq.

Pertinent text of the Act is set out in the Appendix in accordance with Rule 14(1)(i) of the Supreme Court Rule

STATEMENT OF THE CASE

The Defendant is a corporate enterprise which consists of an automobile dealership in Homestead, Florida doing business as "Williamson Pontiac, Cadillac and Mazda" ("Williamson", "Company"). There are eight (8) Departments within the Company, including, but not limited to, the "Used Car Department." The "Used Car Department" employs a manager, salespersons, and two (2) automobile "porters."

In April 1991, the Defendant employed Mr. Jesus Pidal as one of its two Used Car porters (TR. Vol. 2, pg. 34/25 - pg.36/5).[1]

On February 8, 1992, Mr. Pidal was taken to a local hospital for observation after complaining of chest pains, which were not determined to be a heart attack (TR., Vol. 4, pg. 17/2-25; TR. Vol.

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[1] Citations to the transcript of the trial appear as "TR." followed by the corresponding volume number, the corresponding page number, and a designation of the relevant lines on each page.

2, pg. 38/21- pg. 39/3; pg. 91/4-11). Thereafter, Mr. Pidal did not seek to return to work again until July 1992.

The Company's employee medical leave policy in 1992 provided a thirty (30) day period in which the employee would be maintained on the Company's self-insured health plan as if he or she had not left work. After thirty (30) days, the employee was considered separated from the Company's employ and he or she would be provided the appropriate COBRA notification (TR. Vol. 5, pg. 21/3-9). If the employee returned to his or her position within sixty (60) days, there was no job guarantee, but s/he would be re-employed in either the former position or an equivalent if available; and, should the employee not return until after the sixty (60) day period, there was no employment guarantee but he or she would be given priority in applying for available employment positions (TR. Vol. 5 pg. 21/1-24, & pg. 24/1- 25/5).

During his absence from work, Mr. Pidal admitted himself to hospitals on two other occasions, once after having an argument at home with his son, and eventually underwent arterial bypass

surgery on March 3, 1992 (TR. Vol. 4, pg. 14/16-23). The Defendant extended it's employee medical leave policy for Mr. Pidal beyond the usual thirty (30) day period, to include coverage of his March 3rd surgery under the Defendant's health insurance plan (TR. Vol. 4, pg. 8/11-13 & 23-25).[2]

By all accounts Mr. Pidal's surgery was successful (TR. Vol. 2, pg. 94/24-25). On May 30, 1992 Pidal was examined and informed that he was in "excellent" cardiac condition (TR. Vol. 4, pg. 9/13-20; pg. 10/1-10). In fact, Pidal's physician advised him, "there would be no [cardiac] reason not to go back to work," or otherwise resume his normal activities (TR. Vol. 4, pg. 11/1-8; 9-25, pg. 12/1-6; and, pg. 12/14-19.

Without returning to work, Mr. Pidal again saw his doctor for testing and examination on June 5, 1992 (TR. Vol. 4, pg.

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[2]Mr. Pidal ieft the work place on February 8, 1992; the Company, however, extended Mr. Pidal's coverage under the Company health plan through the end of March 1992 (TR. Vol. 5, pg.20/13-25; Plaintiff's Ex. 3, Company correspondence to Pidal dated 3/19/92, notifying him of COBRA rights effective April 1, 1992).

10/11-14). Pidal again achieved "excellent" test results and the doctor "felt he was in good cardiovascular condition at that time" (TR. Vol. 4, pg. 10/15-20). The doctor "gave no reason he [Pidal] should not go back to work because of his heart" (TR. Vol. 4, pg. 11/1-8). The Plaintiff, however, made no attempt to return to work until sometime in July 1992 (TR. Vol. 5, pg. 45/8-12).

After Mr. Pidal left the workplace in February 1992, the Defendant employed another individual to perform the functions of the second Used Car Porter position. The Defendant's employee medical leave policy provided no guarantee of re-employment beyond thirty (30) days after the initiation of a medical absence, and there is no dispute that all times, the employee hired in February satisfactorily performed his job (TR. Vol. 2, pg. 61/21). Approximately five (5) months after he left the workplace, however, Mr. Pidal sought to return to work at his former position (TR. Vol. 2, pg. 33/22, pg. 34/200, pg. 37/20, pg. 38/6).

There is no dispute that the Company possessed no obligation to re-hire Mr. Pidal at the time he sought to return to

work, and the individual who had replaced the Plaintiff was satisfactorily performing his duties. Mr. Gregory Wurl, the Company's General Manager, felt no obligation to re-hire the Plaintiff but had a "big heart" and wanted to help Mr. Pidal with his employment. Thus, Mr. Wurl requested that Pidal obtain a doctor's release to return to work, a request which the Plaintiff himself admits was reasonable under the circumstances (TR. Vol. 3, pg. 36/20-23).

On July 24, 1992, a doctor Walter L. Bringaze III, provided Plaintiff with a written release expressly stating that Plaintiff was "now able to return to work without restrictions" (TR. Vol. 2, pg. 49/9-15). Not only did the Plaintiff obtain a complete release to return to work "without restrictions", but Mr. Wurl was also informed by Mr. Jorge Mas, Pidal's former supervisor, that he had spoken directly to the office of Pidal's physician and was informed that the Plaintiff was "better than ever." (TR. Vol. 2, pg. 49/11-pg.50/4). Further, Mr. Pidal never requested any accommodation

of any type necessary to perform any employment position with the Defendant (TR. Vol. 3, pg. 38/5-21).

Thus, the Defendant re-hired Mr. Pidal on August 3, 1992, in the same position as he previously held, with the same pay, hours, and working conditions (TR. Vol. 2, pg. 105/20- pg. 106/25). At no time did the Plaintiff inform the Defendant that he was unable to perform any function, duty, or responsibility of his employment, with or without any accommodation (Id., see, also, TR. Vol. 3, pg. 38/25 - pg.39/1).

The Plaintiff's re-employment, however, was possible only after the Defendant transferred the incumbent Used Car porter to another position (TR. Vol. 2, pg. 61/18-20).

Thereafter, on the evening of August 4, 1992, three (3) co-workers saw Mr. Pidal sitting in a company vehicle in a public parking lot, while on duty, and having a drink. The witnesses reported they had seen Pidal drinking a beer (TR. Vol. 2, pg. 52/9 -

14; Vol. 5, pg. 81/10 - pg. 83/18; pg. 76/4-20).[3] There is no dispute that drinking an alcoholic beverage while in a company vehicle, in public and on duty, is a violation of company policy.[4]

Accordingly, Mr. Wurl, on the morning of August 5th, informed the Plaintiff that his employment was terminated due to the beer drinking incident. (TR. Vol 2, pg. 51/21 - pg. 52/1-20).

In spite of the above unequivocal facts, the theory of liability presented by the Plaintiff concerning his ADA claim consisted of

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[3] At trial, Pidal denied that he drank a beer, contrary to Pidal's own sworn affidavit given to the EEOC which admitted such (TR. Vol. 4, pg. 40/20 - pg. 43/14; see also, TR. Vol. 5, pg. 63 - pg. 68/16). The Plaintiff also attempted to show that other employees of the Defendant drank alcoholic beverages while at lunch, but was unable to show that Mr. Wurl was aware of such, or that any such individual was employed in a porter position as Pidal and was witnessed drinking an alcoholic beverage in a company vehicle on a public premises.

[4] On December 31, 1991, the Defendant disseminated a memoranda which explained "misuse of company vehicles or company license plates will be grounds for immediate termination". The rule was in effect as of August 1992 (Defendant's Exhibit 1; TR. Vol. 2, pg. 67/9- pg.68/1). It is undisputed that drinking a beer in a company vehicle while performing a company duty is misuse of a company vehicle (TR. Vol. 2 pg. 68/2-5).

the accusation that Mr. Pidal was terminated from employment on August 5, 1992, because the Defendant perceived that he was a future insurance risk. In an attempt to prove the Defendant was motivated by such a perception, the Plaintiff relied exclusively upon unreasonable opinion, speculation, inferences, and misconstruction of the testimony of Mr. Jorge Mas concerning a couple of conversations about the Plaintiff which occurred prior to the time of any decision to re-hire Mr. Pidal. The Defendant respectfully highlights such testimony below.

TESTIMONY OF JORGE MAS

Each Friday morning, the Company held meetings with its managerial employees wherein the general operation of the dealership was discussed (TR. Vol. 2, pg. 40/19 - pg.41/18; pg. 41/23-25; & pg. 42/7-10). At trial, Plaintiff's counsel asked Mr. Mas to tell the jury what was said concerning Mr. Pidal during the weekly meetings while he was away from work. Mas responded:

> "Basically, on a couple of occasions, how he was doing. On a couple of occasions, what were we going to do

> as far as bringing him back. There were at the time 2 porters existing" (TR. Vol. 2, pg. 42/7-10).

Plaintiff's counsel then questioned: "What else was discussed?", and Mas responded, "That's all -- you know" (TR. Vol. 2, pg. 42/19-20).

Plaintiff's counsel further asked Mas whether, during the staff meetings and prior to the Plaintiff returning to work, the subject of terminating the Plaintiff from employment was ever discussed?" Mas replied, "Not actually terminating him, but well, what were we going to do with a third porter, and was there a need for a third porter" (TR. Vol. 2, pg. 43/6-11)[5].

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[5] Mas was subsequently asked "when" the subject of the Plaintiff's ultimate termination from the company was first brought up and he "guessed" that "it" was July (TR. Vol 2, pg. 44/16-24). Mr. Mas clarified that any such discussion would have occurred before Mr. Pidal was re-hired (TR. Vol 2, pg. 44/21- pg. 45/1, emphasis added). Mas also agreed there was "resistance" on the part of Messrs. Wurl and Victor to bringing back Mr. Pidal (TR. Vol 2, pg. 46/2-15), and testified that "[a]gain, because of the extra employees. Also the health insurance problem" (TR. Vol. 2, pg. 46/16-18). And, Mas testified there was concern Mr. Pidal "cost the company a lot of money, and maybe was not healthy enough to come back and continue his work, and that he may get sick again"

Counsel then asked who brought up the idea of firing the Plaintiff, and Mas testified that he could not "recall."[6] Mr. Mas, however, expressly denied the suggestion that anyone "came up with an idea as to how to get around the Pidal problem." Mas testified: "No, I can't say someone had an idea, but Mr. Wurl wanted to make sure he could continue to work and he asked for a doctor's okay" (TR. Vol. 2, pg. 47/16-20).

On re-direct examination, Mas clarified what he remembered Mr. Wurl saying about Mr. Pidal: "To the best of my memory, what I remember him [Wurl] saying, 'before we even consider letting him return, let's make sure that he can get a doctor's letter that he is going to be able to work out there. See if he can come up with that'" (TR. Vol. 2, 77/13-21; see, also, pg. 78/21-79/3).

(TR. Vol. 2, pg. 46/21-25).

[6] Mas, however, was allowed to speculate, over objection, that "it would have to be" either Mr. Victor or Mr. Wurl (TR. Vol 2, pg. 45/7-14).

Mr. Mas further testified, however, that the Defendant was not obligated to re-hire Mr. Pidal, and Mr. Wurl did not believe he was so obligated (TR. Vol. 2, pg. 60/17-21). Mas also testified that Mr. Wurl had "a big heart" and wanted to help Mr. Pidal by re-employing him (TR. Vol. 2, pg. 61/10-17). The Plaintiff himself admitted that Wurl's request for a medical release was reasonable "due to the circumstances" (TR. Vol. 3, pg. 36/20-23).

THE COMPANY HEALTH INSURANCE PLAN

The Company maintains a self-insured, employee health benefits plan ("Plan"). The Plan was designed by Mr. Gregory Wurl, the Company's General Manager, and the Company's President and CEO, Mr. Edward Williamson, III[7] (TR. Vol. 5, pg. 25/6-11; pg.11/7-20). The individual monthly premium payments for the Plan are determined by an independent organization which conducts a census of the Company's needs and establishes a "premium equivalent" for each employee (TR. Vol. 5, pg. 28/1-12).

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[7] Mr. Wurl deceased prior to the initiation of this litigation. (TR. Vol.5, pg.7/22-24).

The employees contribute the majority of premium payments with the Company off-setting a small portion thereof. (TR. Vol. 5, pg. 28/1-12).

The Plan is designed to accumulate a reserve fund (the employee/employer contributions), which is utilized to purchase an HMO plan that covers health care claims with costs up to, and including, $45,000.00 a year, per employee (TR. Vol. 5, pg. 28/1-12; pg. 30/1- pg. 31/12). The Plan also has independent insurance policy referred to as a "stop-gap policy" which insures health expenses for an employee which exceed $45,000.00 in a single year (TR. Vol. 5, pg. 52/6-11). Thus, the health insurance claims of employees cannot adversely impact the Defendant's health care plan or premium payments (TR. Vol. 5 pg. 62/5-12).

At the end of 1991 and 1992, the Plan's reserve fund had an excess of at least $80,000.00 and $50,000.00, respectively (TR. Vol. 5, pg. 31/19 - pg. 32/3). An employee continues to participate in the plan whether he is paying his share of the premium while employed, or the entire premium while on COBRA (TR. Vol. 5,

pg. 22/10-17). There is no impact upon the plan as a result of any employee paying premium costs while on COBRA (TR. Vol. 5, pg. 22/10-17). Effective April 1, 1992, the Plaintiff paid his COBRA premium for three (3) months (TR. Vol. 2, pg. 96/12-25). Mr Pidal's claims in 1992 - prior to his release to return to work without restriction - did not reach the $45,000.00 level (TR. Vol. 5, pg. 5; pg. 34/14-18).

COMPLETE LACK OF ANIMUS/INTENT TO DISCRIMINATE AGAINST INDIVIDUALS SIMILARLY SITUATED TO THE PLAINTIFF

The Company has employed and re-employed a number of individuals similarly situated to Mr. Pidal, i.e., those who have suffered major medical problems, made insurance claims, and remained or returned to the Defendant's employ.

Mr. Mas testified that during the same Manager Meetings where Pidal was allegedly mentioned, another employee, Mr. Jorge Labrada, was discussed "[b]ecause they were incidents that happened pretty much around the same time" (TR. Vol. 2, pg. 63/1-7). Mr. Jorge Labrada is a fifty-nine (59) year old individual

who was originally employed by the Company in 1990, as an automobile painter (TR. Vol. 5, pg. 69/6-10). On February 2, 1992, Mr. Labrada was severely burned in a fire at his farm, requiring a leave of absence from work and substantial medical treatment (TR. Vol. 5, pg.69/15 - pg. 70/5). At the Company's request, Mr. Labrada received a doctor's release to return "to full job duty", without any restrictions on June 14, 1992 (TR. Vol. 5, pg. 71/3-25).

The Plaintiff's health insurance claims in 1992 charged to the Company Plan totaled $33,000 (TR. Vol. 5, pg. 34/14-18; pg. 41/17-20). Mr. Labrada's health insurance costs for 1992 totaled approximately $45,000.00 (TR. Vol. 5, pg. 37/22 - pg.38/2). On June 14, 1992, Mr. Labrada returned to the Defendant's employ and was offered the opportunity to re-join the company health care plan, but voluntarily chose to utilize the plan established at his wife's place of business (TR. Vol. 5, pg. 72/21-23). Labrada remains employed to date, without incident (TR. Vol. 5, pg. 72/2-6).

In addition to Mr. Labrada, the Company introduced specific evidence of four (4) similarly situated individuals:

> 1) a sixty-five (65) year old New Car salesman who experienced heart problems approximately ten (10) years earlier, and had a re-occurrence in 1991-1992 which required two angioplasty procedures. The individual remains employed even though his medical expenses exceeded the Health Plan's stop-gap policy (TR. Vol. 5, pg. 38/3-25, pg.39/3-4);
>
> 2) a sixty-two (62) year old salesman, diagnosed with cancer in 1991, who remained employed with a reduced work schedule until his death in 1993 (TR. Vol. 5, pg. 48/21-49/1);
>
> 3) a sixty-three (63) year old Service Advisor who suffered a heart attack in 1991 or 1992 and underwent open heart surgery. The individual is currently on COBRA and continues to work with the Company on a reduced schedule (TR. Vol. 5, pg. 40/7-22; pg. 50/2-4); and,
>
> 4) a sixty (60) year old salesman, diagnosed and treated for a "glandular problem", who was re-hired after a six (6) month leave and remains employed (TR. Vol. 5, pg. 40/24-41/9; pg. 50/16-25).

Within a month after Plaintiff left the employ of the Defendant in August of 1992, Plaintiff was hired by Tamiami Chrysler Dodge (hereinafter "Tamiami") in its parts department. (TR. Vol. 4, pg. 30). Plaintiff was informed by his supervisor at

Tamiami, Mr. Mario Fernandez, of his recent heart surgery. (TR. Vol. 4, pg. 33/11-16). Plaintiff that his job did not require him to lift anything heavy, and that other employees would perform such tasks (TR. Vol. 4, pg. 34/17 - pg. 35/13, pg. 35). Plaintiff also admitted that he could take rest breaks whenever he needed. Id. Mr. Pidal, however, voluntarily quit that job approximately six weeks after being hired. (TR. Vol. 4, pg. 30). Mr. Pidal admitted at trial, however, that he knew he would have been eligible for health insurance benefits from Tamiami 90 days after his employment began. (TR. Vol. 4, pg. 31).

At the close of trial, the jury returned a verdict in favor of the Defendant as to the Plaintiff's claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"). The Defendant respectfully contends, however, that because of the Plaintiff's referral to having a "heart attack" while on the job, (TR. Vol. 2, pg. 15/19; pg. 91/18-21); the mischaracterization of the purported statements of Mr. Wurl prior to the Plaintiff's re-employment (TR. Vol. 6, pg. 53 - pg.57); and, Plaintiff's claim that

he was not being able to afford his COBRA payments to continue his health insurance and therefore allegedly incurred substantial medical expenses - even though he testified that he paid his COBRA premiums through June 1992, and had been medically cleared to return to work no later than May 30, 1992 (TR. Vol. 6, pg. 60/6-14; TR. Vol. 2, pg. 96/1-25) - the jury was unduly prejudiced to find for the Plaintiff with respect to his disability claim under the Americans with Disabilities Act of 1990. 42 U.S.C. § 12102 et seq. Thereafter, the Defendant timely filed this appeal.

ARGUMENT

Under St. Mary Honor Center v. Hicks, ____ U.S. at __, 113 S. Ct. at 2747, Federal Courts have held that "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." DeLuca v. Winer Industries, Inc., 53 F.3d 793, 798 (7th Cir., 1995) (applies St. Mary Honor Center) to the ADA); see, also Patterson v. Downtown Med. and Diagnostic Center, 866 F. Supp. 1379 (M.D. Fla. 1994); Hindman v. GTE Data Services, 3 AD Cases 641 (M.D. Fla.1994) (plaintiff must show he is suffering discrimination because of the disability); and, Smith v. Upson County, Ga., 859 F. Supp. 1504 (M.D. Ga. 1994) (plaintiff must show a causal connection exists between the adverse employment action and the disability). The facts presented at trial, however, clearly reveal that no such motivation was proven and there is no evidence of a causal relationship between Plaintiff's discharge on August 5, 1992 and a perceived disability and/or record of disability on the part of the defendant. Plaintiff failed to establish that

Defendant was motivated by a discriminatory intent when Plaintiff was discharged. Furthermore, Plaintiff failed to prove that the legitimate, non-discriminatory reason articulated by the defendant was a mere pretext for discrimination. West v. Russell Corp., 868 F. Supp. 313 (M.D. Ala., 1994) citing Texas Dept. of Community Affairs v. Burdines, 450 U.S. 248 (1981). See, also, St. Mary's Honor Center v. Hicks, ____ U.S. __,__, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

The Defendant's General Manager, Mr. Wurl, and its General Sales Manager, Mr. Leonard Victor, decided to discharge the Plaintiff on August 5, 1992, after being informed by three (3) other employees that they witnessed the Plaintiff during the previous evening drinking an alcoholic beverage, while sitting in a company vehicle in public and on duty, and away from the Defendant's premises (TR. Vol 2, pg. 52/1 - 53/1).

Whether the reports were correct or not is irrelevant because the reports alone were legitimate, non-discriminatory reasons to discharge Plaintiff. The Plaintiff cannot create a genuine issue of

fact by disputing the reports that he was in fact drinking on the job. Brown v. Brown & Williamson Tobacco, 70 FEP Cases 1211 (N.D. Fla., 1996). The evidence in this case indicates that the Defendant's actions were based upon the a legitimate, non-discriminatory reason and there is no evidence that would have allowed a reasonable jury to find otherwise.

The only evidence presented by the Plaintiff concerning the Defendant's alleged wrongful motivation was the testimony of Mr. Jorge Mas, a former Manager for the Defendant who supervised the Plaintiff's work performance (TR. Vol. 2, pg. 33/22; pg. 34/20; pg. 37/20-38/6). Mr. Mas, however, did not make or participate in the decision to discharge the Plaintiff in August 1992 (TR. Vol 2, pg. 51/21 - pg. 52/1-20). Accordingly, the motivation of Messrs. Wurl and Victor concerning the Plaintiff's discharge is determinative.

The Plaintiff attempted to show that other employees of the Defendant drank alcoholic beverages while at lunch, but was unable to show that Mr. Wurl was aware of such, or that any such

individual was employed in a porter position as Pidal and was witnessed drinking an alcoholic beverage in a company vehicle on a public premises.

Mr. Mas' testimony is based upon conversations participated in by Mr. Wurl during weekly manager meetings between February 1992 and the time when Mr. Pidal returned to work. At that time, Williamson was under no obligation to rehire Plaintiff. Plaintiff fails to show how the conversations held prior to his rehiring by the Defendant showed a discriminatory motive or scheme to rehire Plaintiff and subsequently discharge him. Regardless, the Defendants would have had no reason to enter into a discrimination scheme since there was (1) no actual obligation to rehire the Plaintiff, and (2) there was no ADA in effect at the time the statements were made and, therefore, no necessity to enter into a scheme to protect the company therefrom. Mr. Mas testified that during those meetings, Mr. Pidal was a subject of conversation on a couple of occasions, such as "...how he was doing. On a couple of occasions, what were we going to do as far as bringing him

back. There were at the time 2 porters existing" (TR. Vol. 2, pg. 42/7-10). Asked what else was discussed, Mas testified: "That's all -- you know" (TR. Vol. 2, pg. 42/19-20). There was no evidence offered to identify the individual(s) who made such comments.

Mr. Mas was also asked if the subject of terminating the Plaintiff from employment was ever discussed. Mas replied: "Not actually terminating him, but well, what were we going to do with a third porter, and was there a need for a third porter" (TR. Vol. 2, pg. 43/6-11).

The Plaintiff's case is obviously premised upon rank speculation and unreasonable inference drawn from such conversations. When Plaintiff's counsel asked Mas what Mr. Wurl actually said during such meetings concerning Mr. Pidal, the following testimony was adduced:

> "To the best of my memory, what I remember him [Mr. Wurl] saying, 'before we even consider letting him return, let's make sure that he can get a doctor's letter that he is going to be able to work out there. See if he can come up with that" (TR. Vol. 2, pg.

77/13-21; see, also, Vol. 2, pg. 78/21- pg.79/3).

All of Jorge Mas' testimony regarding conversations at manager meetings took place prior to the decision to rehire Jesus Pidal on August 3, 1992. There is no factual evidence that anyone at Williamson believed they had to rehire Mr. Pidal and there is no legal authority requiring Williamson to reemploy Jesus Pidal on August 3, 1992. Once Plaintiff legally separated from Williamson, they were under no legal obligation to rehire Plaintiff. Loper v. American Airlines, Inc., 582 F.2d 956 (5th Cir., 1978). Mas' "manager meeting discussions" were all in the context of how Mr. Pidal's health was doing and whether or not Williamson was going to rehire Mr. Pidal. Regardless of the considerations examined by Williamson during the manager meetings, the decision was made to rehire Jesus Pidal and he began working at the exact same job at Williamson on August 3, 1992. The subsequent act of rehiring Plaintiff negated any inference that the prior conversations evidenced a discriminatory intent.

Jorge Mas' testimony indicates that there were two considerations reviewed regarding whether to rehire Jesus Pidal: (1) Was there a need for a third porter because Williamson employs only two porters and both positions were filled, (two porters/three porters issue); and (2) was Jesus Pidal well enough to physically return to his porter position (Pidal's health to return to work issue). Once again, the evidence shows that the Defendant was assessing his employment needs. This type of information has been found to be "classic 'state of mind' evidence that tended to negate any inference of retaliatory intent." Anderson v. Sheppard, 770 F.2d 165 (6th Cir., 1985).

Attorney Manzini, through his questioning, placed emphasis on Williamson's request to Pidal, prior to reemploying Pidal, that Pidal provide Williamson with a doctor's letter identifying that Pidal is physically able to return to his former porter job without restriction. This request does not provide evidence of

discriminatory motive.[8] Mas' testimony, again which concerned only pre-reemployment manager meeting discussion, falls short of satisfying Plaintiff's ADA burden of proof. Attorney Manzini asked Mas "Did somebody come up with an idea as to how to get around the Pidal problem?" (Attorney Manzini never asked who said what.) Mas answered:

> A: No, I can't say somebody had an idea, but Mr. Wurl wanted to make sure he could continue to work and he asked for a doctor's okay. (TR. Vol 2; pg. 47)

On redirect, attorney Manzini again inquired about Williamson's request for a doctor's letter and Mas, attempting to quote Mr. Wurl, stated:

> "...Hey, let's get a letter from his doctor making sure he can come back to work, and if he can get that, okay, and if not, that would be the end of it right there." (Emphasis provided.) (TR. Vol 2; pg. 82)

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[8] Mr. Pidal admitted that the request for a doctor's release to return to work was reasonable under the circumstances. (TR. Vol. 2; pg. 1).

Pidal got the doctor's letter and therefore according to Mas it was "okay", and Pidal was reemployed beginning August 3, 1992 (TR. Vol. 2, pg. 82). Significantly, Williamson followed the same procedure regarding George Labrada who had also suffered a severe health problem in February 1992 and sought reemployment in July 1992. George Labrada, who was also in his late fifties, and who had higher health care claims, obtained a doctor's release and remains employed by Williamson today.

Therefore, upon obtaining the doctor's statement allowing him to return to work, Plaintiff was rehired by Defendant while he was under no legal obligation to do so. Soon, thereafter, the Defendant received three reports by the Plaintiff's fellow employees that the Plaintiff was drinking in a company vehicle while on duty. Based upon these reports, the Defendant discharged the Plaintiff for a legitimate, non-discriminatory business reason.

Assuming, arguendo, that the above statements showed a discriminatory motivation, the subsequent rehiring would negate any

inference of discrimination. Since it is undisputed[9] that the Defendant's were under no obligation to rehire Plaintiff and the statements by Defendant were made prior to the Plaintiff's rehiring, any discriminatory motivation would have easily been implemented by not rehiring Plaintiff. Mr. Mas admitted that at the time the Defendant re-hired the Plaintiff in August, there were no discussions concerning finding a reason to let Pidal go or to make him quit (TR. Vol. 2, pg. 69/21-70/17). In fact, the Plaintiff never told Mas, or anyone else, that he possessed any disability, and it is undisputed that Pidal never requested any accommodation or assistance with the performance of his duties upon his re-hire (TR. Vol. 2, pg. 68/6-11; Vol. 3, pg. 38/16-pg. 39/2). However, once he was rehired, that fact alone negates the inference of

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[9] Mas admitted the Defendant had no obligation to re-hire Mr. Pidal at the time he inquired about returning to work. Mas also acknowledged that Greg Wurl never indicated that he believed he was obligated to re-hire the Plaintiff, but that Wurl had a "big heart" and wanted to help Mr. Pidal by providing him with employment at the time he sought to return (TR. Vol. 2, pg. 61/10 -17).

discrimination by placing Plaintiff in a better position after the conversations the Plaintiff offers as evidence to show discriminatory intent. Similarly, in an EEOC decision, the committee reasoned that an employee who received a pay raise subsequent to a claim filed with the EEOC would negate an inference that the employer discriminated against the employee based upon the EEOC claim prior to the pay raise. (EEOC Decision No. 75-058) Furthermore, Defendant extending the Plaintiff's medical coverage further evidences that Defendant had no discriminatory motivation. The Plaintiff contends that the conversations several months before his rehiring establish the requisite causal connection. However, it is well settled that a causal connection is "demonstrated by the proximity of the adverse action to the protected activity." The Plaintiff's surgery in March 1992 is not within the proximity of the August 1992 discharge, especially since the Defendant was under no legal duty to rehire Plaintiff.

In a similar case, Szymanska v. Abbott Laboratories, 3 AD Cases 748 (N.D. Ill. 1994), two employees brought suit against

their former employer alleging, inter alia, claims of disability discrimination under the ADA. One of the employees (Ms. Pietraszewski) had a history of hospitalization and surgery for the treatment of kidney cancer and was subsequently discharged by two company officials who had knowledge of her health condition. The employee asserted her employment was terminated because she was "perceived" to be handicapped. Summary judgement was granted on behalf of the Defendants, however, because the employee had returned to work, without restriction or incident, subsequent to her hospitalization. The court stated, "Her past condition and past hospitalization does not, without more, indicate any impairment or history of impairment that substantially limits any of her major life activities. Significantly, there is no evidence that her activities were impacted by her cancer prior to her surgery and no evidence that she requested any accommodation after her surgery and sick leave." Id. at 761. Like Ms. Pietraszewski, Mr. Pidal presented no evidence that his health had any impact on his life activities prior to his leave in February 1992, and there is no evidence that Mr.

Pidal's health affected any major life activity after his return from surgery (Pidal received a clean bill of health as of May 30, 1992). Pidal also admits he never sought, nor needed, any accommodation after his recovery.

As in Pidal, the Defendant in Szymanska was also charged with having made comments regarding the plaintiff's health problems and their impact on her work. Specifically, the plaintiff alleged that a supervisor who visited her in the hospital after her kidney surgery asserted that the problems the Defendant had with her work performance "are related to her health problems." Id. at 753. The court, however, held that such stray remarks were insufficient to indicate the defendant perceived her as handicapped. Id., 3 AD cases at 760-761.

Similarly, the facts of this case reveal the Plaintiff failed to establish any causal relationship between his alleged disability and his ultimate discharge, subsequent to his August 1992 re-hire. Further, the comments actually attributed to Mr. Wurl, and any reasonable inference to be drawn therefrom, are insufficient to

prove the Defendant was illegally motivated when discharging Mr. Pidal on August 5, 1992.

The preceding is the extent of factual evidence presented by the Plaintiff concerning the Defendant's motivation for discharging Mr. Pidal on August 5, 1992, allegedly because of his disability, record, or perception thereof. There is simply no competent evidence, however, which indicates the Defendant's motivation for terminating Mr. Pidal's second period of employment was based upon, even in part, a disability, perception/record of such, or any alleged fear of an adverse effect upon the Defendant's health insurance plan.

Therefore, Plaintiff cannot meet its burden of showing that Williamson pretextualy terminated Pidal for drinking on the job and actually terminated Pidal for a discriminatory reason.

CONCLUSION

For the foregoing reasons, Peetitioner, W.W.W. Enterprises, Inc., respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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